Filed 12/28/09 P. v. Miller CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARTIN DAREE MILLER, Defendant and Appellant.	F055635 (Super. Ct. No. VCF154973) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

Appellant Martin Daree Miller was convicted after jury trial of the premeditated murder of Jesse Rios (count 1, Pen. Code,[1] § 187, subd. (a)), and of the attempted murder of Dario Davalos (count 2, §§ 664, 187, subd. (a)). The jury also found as to count 1 that Miller personally and intentionally discharged a firearm in the commission of the offense causing great bodily injury to Rios. (§ 12022.53, subd. (d).) With respect to count 2, the jury found that Miller had personally and intentionally discharged a handgun in the commission of the offense (§ 12022.53, subd. (c)), and that he had personally and intentionally discharged a firearm causing great bodily injury to Davalos. (§ 12022.53, subd. (d).)

Miller was sentenced on the murder count to 25 years to life, plus an additional consecutive 25 years to life for the section 12022.53, subdivision (d), enhancement. On the attempted murder count, the court imposed the middle term of seven years, plus a third 25-years-to-life term for the section 12022.53, subdivision (d), enhancement. The court stayed the remaining firearm enhancements. The total term is 82 years to life. Miller was 24 years of age at the time of trial.

FACTUAL SUMMARY

In November 2005, a group of young people attended a party in Tulare. Included in the crowd were five Black males, Miller, Tristan Evans, Debrae Evans, Adell Evans[2] and Frankie Wilson, all related by blood or marriage. Miller and Wilson were from Arizona and were in Tulare visiting Tristan. Miller, who played football in college, was a big stocky man, standing six feet three inches tall and weighing 270 pounds. Debrae was also large, at six feet two inches tall and weighing approximately 260 pounds. Wilson

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] In order to distinguish between the three Evans men, we refer to them by their first names.

weighed 170 pounds and was five feet nine inches tall. Adell was smaller, weighing 160 pounds and standing about five feet nine inches tall. The five men heard about the party after meeting some young women at a store.

At the party, a fight broke out among some of the Hispanic partygoers. Someone, identified only as a "Mexican," fired into the crowd. Several individuals were shot, including Debrae and a young Hispanic female. Dario Davalos was at the party. He and an acquaintance, Sandro Munguia, took the young Hispanic female victim to the hospital in his pickup truck. There were other victims who were also transported to the hospital by friends. Jesse Rios, his brother Miguel Rios, and his girlfriend Elise Flores had been at the party and also came to the hospital. There were several others from the party who were present.

Miller and his relatives drove Debrae to the hospital in Tristan's white car, but they stopped at Tristan's house first, allegedly to tell Tristan's girlfriend that they were taking Debrae to the hospital and to ask her to call Debrae's parents. Tristan, however, spent all his time at the hospital on the phone trying to call Debrae's father. Davalos testified that the Miller group arrived after he did.

In the hospital emergency room, emotions ran high. Adell was extremely agitated and accused the Hispanics present of shooting his brother. Several witnesses claimed that Davalos, Rios, and others tried to calm down Adell, telling him that they had not been the shooters, and that they too had friends in the hospital who had been shot. They were not successful.

The conflict in the emergency waiting room escalated and the group was told by the hospital security guard to leave. The group moved to the parking lot. Witnesses testified that Adell was arguing with Jesse Rios. All witnesses said that the conflict was between a mixed group of Hispanics and a group of Black males. Davalos said he was standing with Rios when a Black male came up with a gun and started to shoot. Rios was shot in the eye and died as a result of his wounds. Davalos turned and ran but was shot as

he did so. Davalos identified the Black male shooter as a big man, "kinda thick," taller and considerably heavier than Davalos. Davalos picked Miller out of a photo lineup, saying that he was "50% sure" Miller was the shooter. Davalos testified at trial that Miller looked like the shooter.

Munguia testified that at the hospital a car full of Hispanics and a car full of Black males wanted to fight. He testified that he saw Miller shoot Rios and Davalos. He described Miller as being between 5 feet 10 inches and 6 feet, and as being "kinda stocky." Munguia said that Miller was wearing a gray sweatshirt. He said after the shooting, Miller ran to the white car—the same one that had been used to bring Debrae into the hospital. Munguia said he had seen Miller at the party and identified him at trial as the shooter.

Flores said she was standing next to Rios and that a tall Black man, built like a football player, was the shooter. She said the shooter was wearing a gray Arizona sweatshirt with gray and orange writing. She said that after the shooting the Black men ran to a white car and drove off.

Wilson testified that he was standing next to Adell when he saw a "spark" in his face from behind and realized it was a gunshot. He turned around and saw Miller running. Wilson also ran back to the car, as did Adell. The three left in the white car, leaving Tristan and Debrae at the hospital. Miller was driving. Shortly after, Miller and Wilson switched places because, according to Wilson, he was the only one with a driver's license. Miller, however, did have a driver's license, and it is undisputed that he drove to the party.

The group went back to Tristan's house. Wilson and Adell threw their shirts and hats into a neighbor's trash can. Wilson said that Miller was not with them at this point and he did not know what happened to the gray sweatshirt Miller had been wearing. Wilson thought the sweatshirt had something on the front of it.

Miguel was not a cooperative witness at trial, expressing fear about testifying. He testified that Rios was trying to calm people down without success when he was shot. Miguel said he ran when Rios was shot but saw the shooter jump into a white car and drive away. He said the shooter was big and refused to identify anyone at trial. At the preliminary hearing, Miguel testified emphatically that Miller was the shooter and was wearing a gray sweatshirt with orange writing at the belly.

Hospital supervisor Alan Davis testified that he saw a young Hispanic man and a young Black man in a heated discussion outside the hospital emergency room. The Black man was claiming that someone had shot his brother. Davis then saw a Black man walk off and then veer into the crowd. Davis heard a pistol cocking and saw the Black man raise his arm and shoot. Davis said the shooter had on a two-tone shirt that was lighter on top and darker at the bottom. Davis said the shooter was approximately 5 feet 11 inches or 6 feet tall, stocky, athletically built, and around 280 pounds. The shooter ran to a light-colored car.

The police arrived at Tristan's house the morning after the shooting, shortly after Debrae had been released from the hospital. Miller, Adell, Tristan, and Wilson were arrested. When interviewed by police, Miller admitted to shooting Rios and Davalos. He claimed that he picked up a gun that had been abandoned at the scene of the party. He said he got the ammunition for the gun from a friend. Miller told police that Adell was angry because his brother had been shot and was arguing with the Hispanics from the party present at the hospital. When the group moved to the parking lot, Miller said that Adell was arguing with two Hispanic males. Miller said he saw the Hispanic male go to his waistband, and wanted to "back up" his cousin so he shot him. He said he shot Davalos because he thought Davalos was armed as well. Miller also told police that, after leaving the hospital, he disposed of the gun but did not know where. The murder weapon was never recovered.

Miller also said he changed his clothes when he got back to Tristan's house. The police never found a gray sweatshirt with orange writing. They did find a gray sweatshirt that Tristan's girlfriend thought Miller had been wearing at the time. The shirts Wilson and Adell wore were recovered from the neighbor's trash can. All three items tested positive for gunshot residue. The expert reported that the amount of gunshot residue on the two shirts worn by Wilson and Adell indicated exposure to residue from the discharge of a firearm. Both these shirts were visibly stained with blood. The small amount of gunshot residue found on the sweatshirt did not provide substantial evidence of exposure to a firearm being discharged. There was no obvious blood on the sweatshirt and there was an old bullet hole in the shirt.

Several .40-caliber shell casings were found at the scene of the party shooting. These casings matched the casings found at the scene of the hospital shooting. Tristan said that he had .40-caliber ammunition in his house. Police recovered a .40-caliber bullet and a pistol grip in a search of Tristan's car. They also found a pistol with ammunition in the house at the time it was searched.

Defense

At trial, Miller denied shooting Rios and Davalos. He claimed he never admitted being the shooter during the police interview. Miller's interview was not taped because the tape recorder was inadvertently paused at the start of the interview. Miller testified he had stayed with the car when the group dropped off Debrae until he saw Adell in a conflict with a group of Hispanics. He then left the car and walked over to the group. He said he had not arrived at the group yet when he heard shooting and turned to run back to the car. When Adell and Wilson arrived, the three drove off. Miller said he saw another car leave as well. Miller said no one in the group had a gun, and he had not seen the gun at Tristan's, the ammunition, or the pistol grip in the car.

The police interviews of Adell and Wilson were taped and both individuals claimed they had not seen Miller shoot Rios or Davalos. Adell said Miller was not the

shooter; Wilson said he did not know who was the shooter. The defense claimed this was a case of mistaken identity and suggested that the shooter was a rival gang member. Two of the witnesses picked someone other than Miller as the shooter in the photographic line up. Denise Garcia picked someone who looked like the shooter but said she was not certain; the individual she selected was not Miller. The hospital security guard also picked someone other than Miller as the shooter. The guard did say that Miller was in the group outside the emergency room. The guard also testified that the shooter was a Black medium-sized man and described "medium size " as someone weighing about 200 pounds. He then, using a hospital surveillance photograph, identified a Black male, later identified as Wilson, wearing a distinctive black and white shirt, as the person he believed was the shooter. The guard reiterated a number of times that he could not be sure who the shooter was and said he believed that Wilson was the shooter because he had made threatening comments earlier in the emergency room. When interviewed by police, the guard said the shooter was a tall Black male in dark clothing. Davis picked out Tristan as the shooter when asked to identify the shooter in the photo line up.

In support of the defense gang theory, several witnesses said that gang members were present at the party. Flores testified that the fight at the party started when Rios and another man began to fight with others and that she remembered seeing "blue," the color of the Surreño gang. She said that Rios's friends claimed "red," the color of the Norteños. She also said that Rios used to hang out with the Norteños, but now hung out mostly with Crips. Flores also said that Rios tried to tell Adell that it was the "enemy" who shot Debrae. Defense counsel represented that there was one witness, Jose Yanez, who could not be located to testify at trial but who said he saw a person wearing a blue rag over his face shoot Rios.

DISCUSSION

I. Exclusion of gang evidence

Miller claims the trial court abused its discretion and denied him a defense when it precluded him from introducing evidence that gang culture requires that gangs retaliate after being targeted by rival gang activity. The trial court excluded the gang expert testimony, ruling that, although there was some evidence that gang members were present at the earlier party, there was no evidence that the shootings at the party or later at the hospital were gang motivated. After explaining that it understood the defense claim that the shootings at the party, if gang motivated, would have provided someone with the motive to retaliate, the trial court noted:

> "Here, we don't have that. We have, really, a claim by the defense that [the shooting] was gang related and someone out there in one gang or another, we don't even know which gang, had the motivation [to commit the offense] because this expert's going to testify retaliation is important to the gang member, and we have nothing else to indicate that. [¶] The Court's not going to allow it. The gang is not probative in this case. If it has any probative value at all, which I highly question, the time consumption and the ability to really divert the jury and mislead them is great …."

On appeal, we review a trial court's decision to admit or exclude evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

The defense is entitled to present evidence of third-party culpability in order to exonerate a defendant if the evidence is capable of raising a reasonable doubt about the defendant's own guilt. (*People v. Sandoval* (1992) 4 Cal.4th 155, 176.) The evidence Miller sought to present falls within this category because it was intended to show that someone other than Miller had a motive for shooting the victims. The rule governing third-party culpability evidence does not, however, "'require that any evidence, however remote, must be admitted to show a third party's possible culpability…. [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not

suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citation.]" (*Id.* at p. 176.)

We conclude that Miller's showing related to third-party culpability is insufficient. There was evidence that there were gang members present at the party where the initial shootings occurred. There was also evidence that Rios had some gang affiliation. There was no evidence, however, other than pure speculation, that the party shooting was gang motivated or that the hospital shooting was a retaliatory act. The defense merely raised the possibility that others had a motive to shoot the victims at the hospital but provided no direct or circumstantial evidence linking gang activity to the shootings. Although defense counsel represented that there was a witness named Yanez who had reported seeing someone with a blue rag in the parking lot commit the offense, Yanez was not produced at trial. No one at trial suggested that anyone other than a large Black male, present at the hospital and standing in or near the crowd, was the shooter. No other witness mentioned a blue rag.

This case is similar to *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-1018, where the defense sought to introduce evidence concerning the victim's association with motorcycle gangs and drug dealers in order to prove that someone other than the defendant committed the murder. In *Edelbacher*, our Supreme Court held that such evidence was inadmissible where no possible suspect other than the defendant was identified, where there was no link of any third person to the crime, and where only a potential motive was alleged. (*Ibid*.) This is the situation we have before us. All the evidence establishes that the conflict at the hospital was between the group with Rios and the group with Miller. There is no evidence that Miller or his relatives were gang members or that the dispute between the two groups was gang related. No evidence links the offenses to a rival gang member.

Given this record, we conclude that the gang expert testimony proffered here was too speculative and tangential to be admissible under the third-party culpability evidence rule. (See *People v. Lewis* (2001) 26 Cal.4th 334, 373 [trial court properly excluded third-party culpability evidence as "too speculative to be relevant"].) The probative value of the evidence, if any, did not outweigh its prejudicial effect and the trial court did not abuse its discretion in excluding it. (*Ibid*.; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 682 [evidence irrelevant if it produces only speculative inferences].)

Even if we were to conclude it was error to exclude the evidence, there is no prejudice. The jury heard the gang evidence, which the defense claimed supported the inference that the shooting at the hospital was done in retaliation for the shooting at the party. The jury heard that there were members of rival gangs present and that the victim had changed gang allegiances. It heard that, when the initial fight at the party erupted, one witness remembered there being both Surreños and Norteños present. We may take judicial notice that citizens of Tulare County and other valley communities know that relationships between rival gangs often erupt in violence as gang members seek to protect their turf and retaliate against one another to even the score. (Evid. Code, § 451, subd. (f); see *Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 481 [court takes judicial notice as matter of common knowledge that street gangs protect home territory and gang activity spawns violence].) Had the jury wanted to draw the inference the defense claims it should have been allowed to develop, it could have done so without the help of an expert.

We are also not convinced that the jury's questions during deliberation regarding (1) Miller's admission to police and (2) its request for a read-back of several witnesses' testimony suggest the jury was having trouble reaching a verdict. We agree with respondent that the request for read-backs and the questions asked by the jury reflect a consciousness of the jury's responsibility and its diligence in carrying it out. (*People v. Houston* (2005) 130 Cal.App.4th 279, 301.)

Further, although there was some evidence that would have supported a reasonable conclusion that someone other than Miller was the shooter, there is no evidence to support a reasonable conclusion that the shooter was someone other than one of Miller's group. All of the witnesses to the event who testified at trial, without exception, said the shooter was in or near the crowd of people in the parking lot surrounding Rios and Adell. All of them identified the shooter as a Black man. All of them said the shooting stemmed from a confrontation between Rios and a Black man. Although there was some disparity among the eyewitnesses' descriptions of the shooter, none of them identified the shooter as a gang member and all of them said the shooter was in close proximity to the argument.

In addition to the eyewitness testimony, there was additional independent evidence that Miller was the shooter, including evidence that Miller confessed to shooting Rios when interviewed by the two detectives; Miller's behavior after the shooting; the behavior of his relatives after the shooting; and the ammunition and pistol grip found in the car. Given the overwhelming evidence of guilt, we conclude that, excluding the gang expert testimony, even if error, would have caused Miller no harm.

For these same reasons, we also reject Miller's contention that the exclusion of the evidence violated his state and federal constitutional rights to present a defense. The absence of the expert testimony was not prejudicial under any standard of review.

II. Jury instruction

Next Miller contends that the trial court erred when it failed to include in its instructions to the jury Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 361. The instruction directs the jury how to evaluate a defendant's testimony when a defendant fails to explain or deny evidence against him. Miller claims the instruction was "key to the jury's assessment of appellant's credibility" and the omission was prejudicial. We disagree.

It is undisputed that CALCRIM No. 361 was included in the instruction packet and the trial court intended to give it. The record reveals, however, that although the trial court started reading CALCRIM No. 361 (it read the phrase "[I]f the defendant failed in his testimony"), it inadvertently picked up the text of the next instruction without completing CALCRIM No. 361. A copy of CALCRIM No. 361 was provided, however, in the instructional packet given to the jury for use during deliberations. In addition, the court told the jury that it would receive a copy of the written instructions for use in the jury room.

We conclude any error in failing to read the instruction was harmless under either the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, or the reasonably probable standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (Cf. *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1108 [failure to instruct on elements of offense is error of clear constitutional import, but failure to instruct jury on one of tests used in evaluating credibility of witness is evaluated under *Watson*].)

The jury here was given written instructions, which included the complete CALCRIM No. 361 instruction. (*People v. Prieto* (2003) 30 Cal.4th 226, 255.) The written instructions govern in any conflict between the oral and written instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) We may presume that the jury was guided by the written instructions. (*People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2; *People v. Davis* (1995) 10 Cal.4th 463, 542.) We recognize that in *People v. Murillo, supra,* 47 Cal.App.4th at pages 1107-1108, another appellate court refused to presume the jury read the written instructions in the absence of evidence that it had done so. *Murillo,* however, does not cite to either *McLain* or *Davis,* nor does it address the presumption announced and applied in both these state Supreme Court cases. In *Murillo,* the court made no reference to the missing instruction in the oral reading and therefore there was nothing to alert the jury that there was conflict between the oral and written instructions that needed resolving. Here, the trial court began to give CALCRIM No. 361 and then

abruptly went on to another instruction. This would alert the jury that reference to the written instructions was needed.

In addition, when considering an allegation of instructional error, we look to the instructions as a whole. (*People v. Jablonski* (2006) 37 Cal.4th 774, 831; *People v. Reliford* (2003) 29 Cal.4th 1007, 1013.) In this case, the jury was told how to evaluate the testimony of any witness testifying (CALCRIM No. 226), and was told that neither side is required to call all witnesses or to produce all evidence relevant to the case (CALCRIM No. 300). The jury was told repeatedly that the prosecution bore the burden of proving beyond a reasonable doubt that Miller had committed the offense.

The jury was also told, with specific reference to Miller, that any evidence it heard from Miller or statements attributed to Miller had to be evaluated in light of all other evidence, and that it was up to the jury to decide the importance of this evidence. This instruction was in reference to prior statements by Miller, any false statements by Miller, any evidence that Miller tried to hide evidence, and any evidence that Miller left the scene of the crime. (CALCRIM Nos. 358, 362, 371, 372.) As to each of these, the jury was instructed that it was to determine whether this evidence was significant. In most instances, the jury was further instructed that the evidence that Miller had made a false statement or tried to hide evidence was not sufficient by itself to prove guilt. In light of these instructions, we conclude the jury understood it was to rely only on evidence actually before it and that it was not to place significance on any failure by Miller to explain evidence adverse to him when testifying. It also was clear to the jury that the prosecution retained the burden of proof no matter what evidence was or was not produced by Miller. (See *People v. Murillo, supra*, 47 Cal.App.4th at p. 1109 [when viewed as whole, court concludes jury was adequately instructed on relevant legal principles, despite absence of required instruction].)

III. Cruel and unusual punishment

Miller next contends that his sentence of 82 years to life equates to life without possibility of parole. Since he is a young man with no prior criminal record, Miller claims this sentence constitutes cruel and unusual punishment in violation of both the state and federal Constitutions.

"Cruel and unusual punishment is prohibited by the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted.)

The Legislature has deemed it appropriate to impose harsh punishment for those who take a life and do so by personally discharging a firearm. Miller acknowledges that all components of his sentence are mandated by statute and that imposition of a section 12022.53 firearm enhancement has been uniformly upheld in California. (See *People v. Felix* (2003) 108 Cal.App.4th 994, 999-1002.) "'Defining crime and determining punishment are matters uniquely legislative in nature, resting within the Legislature's sole discretion.' [Citation.]" (*People v. Lewis* (1993) 21 Cal.App.4th 243, 251.) "Our Supreme Court has emphasized 'the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17 [of the California Constitution], the validity of enactments will not be questioned "unless their unconstitutionality clearly, positively, and unmistakably appears."' [Citation.]" (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.)

A sentence that is the functional equivalent of life without possibility of parole is not, as a matter of law, unconstitutionally disproportionate. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399 [term of 240 years], disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) As a result, we must determine if such a sentence is cruel or unusual based on Miller's current offenses and criminal history, applying the familiar test of disproportionality adopted under both the federal and state Constitutions. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136 [court has authority to intervene and find sentence unconstitutional where there is proper showing, even when sentence authorized by statute]; *Solem v. Helm* (1983) 463 U.S. 277, 289-290.) We review independently the question of whether Miller's sentence is cruel and unusual. (*People v. Mora* (1995) 39 Cal.App.4th 607, 615.)

Miller focuses his challenge on the nature-of-the-offense and the nature-of-offender analyses identified in *In re Lynch* (1972) 8 Cal.3d 410, 425. The factors identified in *Lynch* are: (1) the nature of the offense and/or the offender; (2) the nature of the punishment compared to other punishments imposed by the same jurisdiction for more serious offenses; and (3) the nature of the punishment compared to other punishments imposed by other jurisdictions for the same offense. (*Id.* at pp. 425-427.) Regarding the offense, the court must evaluate the totality of the circumstances surrounding the offense, including its motive, the way it was committed, the defendant's involvement, and the consequences of the offense. Regarding the offender, the court must evaluate the defendant's individual culpability, including his age, prior criminality, personal characteristics, and state of mind. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) The federal Constitution affords no greater protection than the state Constitution. (*People v. Martinez, supra,* at p. 1510; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.)

Miller focuses only on the first *Lynch* factor—his individual culpability. He claims he is a youthful offender, without a criminal history, attending college and playing

football, and is someone who has a chance of being rehabilitated. Based on these facts, he claims the sentence imposed was disproportionate with the crime committed.

We disagree. Miller's crime was senseless and unprovoked. It did not involve the use of drugs or alcohol. Miller took the life of a young man and severely injured another young man. It unleashed violence at a place where individuals come to seek medical aid, placing medical personnel as well as innocent and medically compromised individuals at risk. Miller soberly chose to pick up a gun that had been abandoned on the street rather than call law enforcement; to drive to his cousin's house to find appropriate ammunition despite the immediate medical needs of his cousin; and to deliberately shoot an unarmed individual at close range without provocation.[3] He then fired at a fleeing Davalos, despite the crowd of individuals present and at risk. Miller knew Adell was the aggressor in the conflict between Adell and Rios. He knew or should have known that the individuals present at the hospital were not the individuals responsible for the shootings at the party. He chose to respond with violence without regard to the consequences of his actions on the lives of others.

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[3]Miller argues in his opening brief that he shot Rios only after believing that both Rios and Davalos were reaching for weapons in their waistbands. He claims this court must accept this fact as true, citing *People v. Toledo* (1948) 85 Cal.App.2d 577. We disagree. First, Miller did not claim self defense at trial. The jury heard that this was what Miller claimed when first interviewed by police, but the defense was not raised or argued at trial. The jury obviously rejected as true Miller's earlier initial claim that he acted in self defense, otherwise the jury could not have found the murder to be of the first degree. We need only accept as true those facts and inferences that could have been deduced from the evidence to support the verdict. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237; *People v. Reilly* (1970) 3 Cal.3d 421, 425.) Second, the *Toledo* doctrine is not applicable where there is other competent and substantial evidence to establish guilt as there is in this case. (See *Matthews v. Superior Court* (1988) 201 Cal.App.3d 385, 393-394 [where defendant's statement tends to disprove criminality but other prosecution evidence tends to prove criminality, it is function of jury to determine which version is correct].)

We conclude the sentence imposed is not constitutionally disproportionate to the crime committed under either the state or federal Constitution.

IV. Abstract of judgment

Finally, Miller contends that the abstract of judgment does not accurately reflect the sentence actually imposed by the trial court. The respondent concedes error and we agree.

The trial court imposed a seven-year determinate middle term as the base term on count 2, and added a consecutive 25-years-to-life firearm enhancement. It then stayed the remaining firearm enhancements. The abstract does not reflect this sentence. The determinate abstract lists additional enhancements that were not imposed and were not part of the jury verdict. Further, on May 27, 2008, the trial court awarded Miller 921 days of presentence credit. This has not been added to the abstract of judgment. (See *People v. Hartsell* (1973) 34 Cal.App.3d 8, 13-15.) We will order the corrections. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts may order abstract of judgment corrected where it does not accurately reflect sentence imposed].)

DISPOSITION

The judgment is affirmed. The abstract of judgment shall be amended to reflect a seven-year determinate middle term on count 2, plus a 25-years-to-life firearm enhancement pursuant to section 12022.53, subdivision (3), and to include 921 presentence custody credits, with copies provided to all appropriate authorities.

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Wiseman, Acting P.J.

WE CONCUR:

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Levy, J.

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Kane, J.